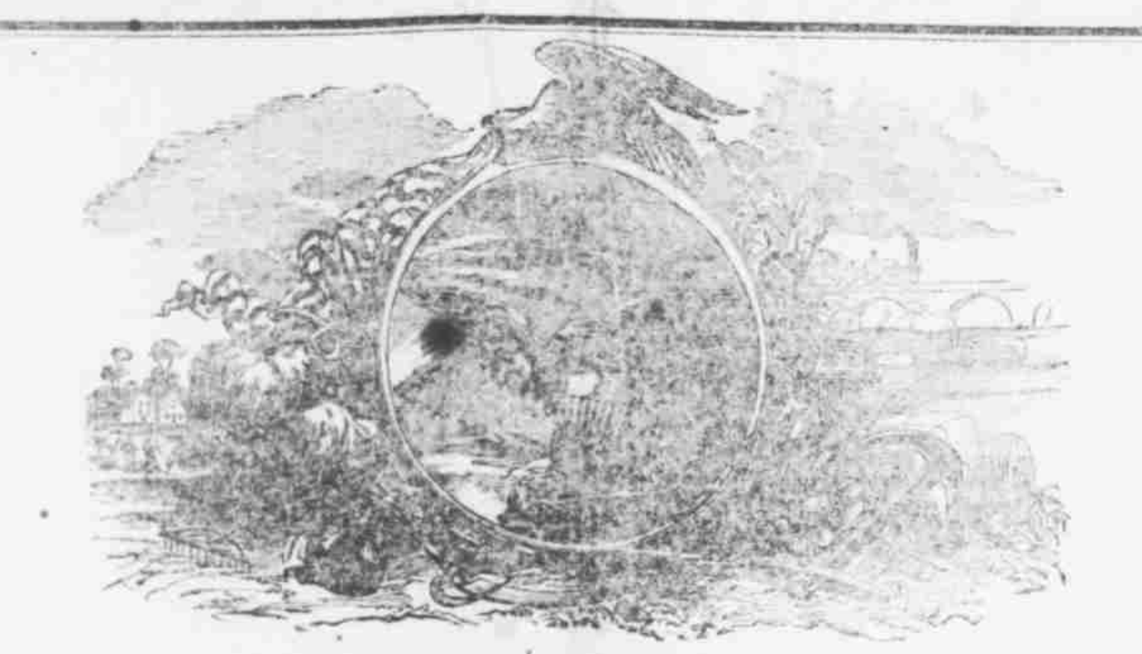
Eastern Clarion.



BY S. R. ADAMS. | PAULDING, MISSISSIPPI, MARCH 2, 1859. | VOLUME XXII. NO. XX.

Poetry.

Benj. Franklin,

Born January 17th, 1706.

THE PRINTER BOY.

[illegible]

Ben Franklin was that Printer boy.

[illegible]

DECISIONS OF THE HIGH COURT.

October Term, 1858.

[*Reported expressly for the Eastern Clarion.*]

828. Mary Wyse, executrix vs. Elias Dandridge et al.

This was a bill filed in the District Chancery Court at Hernando, by the appellees, to recover of the appellant's testator, two slaves alleged to be property of the appellees.

The facts material to the consideration of the case appear to be, that on the 4th November, 1846, one Jesse M. Tate, for the consideration of the sum of four hundred dollars, executed a deed conveying to Nathaniel W. Dandridge, Jr., of DeSoto County, in this State, the two slaves upon trust, "that Eliza Dandridge, the mother of Nathaniel W. Dandridge, Jr., should have and be entitled to all the profits arising from the use of said slaves during her natural life, to her own sole and separate use, free from all control of her husband; and at her decease, that said slaves should be conveyed in fee simple to Mary Elizabeth and Eliza Dandridge, the two youngest and unmarried daughters of Eliza Dandridge, the mother of said Nathaniel W. Dandridge, Jr." This conveyance took place in Memphis, in the State of Tennessee, where the slaves then were, where the *cestui que trust* resided, and where the trustee was on a visit at the time, and it was registered in the proper office in Tennessee on the 20th of February, 1847, and it appears to be admitted that it was delivered for registration on the 15th of that month. After the execution of the deed the trustee took the slaves into possession and brought them into this State; and on 16th of February, 1847, sold and conveyed and delivered them to one —— Steinlein for the consideration of six hundred and fifty dollars; and on the 29th day of the same month Steinlein sold and conveyed and delivered them to Wyse, the appellant's testator, for the sum of six hundred and seventy-five dollars. The deed of trust was never registered in this State.

The answer of the appellant's testator in the first place, insists that the trust deed was made with reference to this State; and although the *cestui que trust*, and the slaves were there in Tennessee, yet that the trustee resided in this State, and was so described in the deed, and that the trusts confided to him contemplated the removal of the slaves to this State in order to the due execution of the trusts; and hence that the deed should have been registered in this State, and was void as to Wyse for want of such registration.

2. He claims to be a *bona fide* purchaser from Steinlein, for a valuable consideration, and without notice.

3. He relies on the statute of limitations in virtue of his possession of more than three years. Upon the hearing, a decree was rendered for the complainants for the slaves with hire; from which the appeal was taken.

The first position taken in the answer appears to be untenable. It is true that the trustee resided in this State, but the slaves were in Tennessee. By the terms of the deed Mrs. Eliza Dandridge was to have the profits arising from them, during her life. But that did not necessarily require that they should be removed to this State by the trustee, or that they should be employed or hired out by the trustee in this State. He might have done that in Tennessee without any violation of either the letter or spirit of the deed; and his subsequent removal of them merely tends to show that for some reason it was deemed proper and advisable to take them to this State. But the property was there, and the contract and conveyance were made there, and the rights of the parties must be governed by the laws of that State, unless it was clearly shown that the conveyance was intended to take effect in this State and not there.

The next question is, whether the appellant's testator is entitled to protection as a *bona fide* purchaser, without notice; or rather, whether the complainant's claim could be enforced against him as such purchaser. It is distinctly alleged in the answer of Wyse that he purchased for a valuable consideration and in good faith, without any notice whatever of the claim of the complainants, or of any other person under the deed of trust—and it is also alleged in the answer of Steinlein to the cross-bill, that he purchased from Nathaniel W. Dandridge, without notice, and for a valuable consideration. There is no evidence tending in the least degree to show that these allegations are not true in fact.

It is to be observed that the *legal title* was in the trustee who also had possession of the property. Having the *legal title*, he was invested with the *power* to sell the property even to the prejudice of his *cestuis que trust*, so far as the rights of a party purchasing and obtaining a conveyance of the legal title, *bona fide*, and for a valuable consideration, were concerned. The rule upon this subject is well stated by Judge Tucker, thus: "A purchaser without notice who has acquired a legal title, and paid his money, without notice of the trust, is protected in equity even against the *cestui que trust*—for by obtaining the legal title he had the law in his favor, and having purchased and paid his money, without notice, he has equal equity with the *cestui que trust*. [2 Comm. 436.] And this doctrine is amply sustained by authority. [2 Fonbl. Eq. book, 2 ch. 7 § 1, and has been frequently sanctioned by this Court. Bank of England, vs. Tarleton, 23 Miss. 173, 182; Lusk vs. McNamer, 24th, 58; Henderson & Moore vs. Wamack, 27th, 839.

But it is contended, that as the deed of trust, having been executed in another State, was not required to be registered in this State, the rights of the *cestuis que trust* are not impaired by the failure to record it here. This is true to a certain extent. The rights granted to the *cestuis que trust* by the deed could not have been defeated and the property rendered subject to the debts of the trustee or of the grantor in the deed, in consequence of the mere non-registration of the deed here; and this is the rule held in the cases of Palmer vs. Cross—[1 S. & M. 48; Dobbs vs. Prewitt, 13 Ib. 431, and Prely vs. Rogers, 24 Miss. 524]—relied on for the appellees. So long as the trustee was passive the rights of the *cestuis que trust* were unimpaired by the failure to record the deed here. But the cases cited do not go to the extent, that the registration in another State is notice to a purchaser here; nor do they sanction the principle, that a party acquiring the legal title here *by purchase from the trustee bona fide*, and for a valuable consideration without notice, will not be protected. On the contrary, when the trustee conveys the legal title by deed to such a purchaser, though to the prejudice of the *cestui que trust*, the purchaser will not be disturbed in his title at the instance of the *cestui que trust*—and this is settled doctrine.

It is also said that this rule in behalf of *bona fide* purchasers, applies only to real estate. But it is also applicable to purchasers of chattels, and has been so held by this court in the cases above cited.

As to the sufficiency of the averments in the answer to entitle Wyse to the benefit of the defence as a *bona fide* purchaser, they appear to be full and comprehensive. The answer shows the payment of the purchase money in full, and denies that he had any notice, either in fact or in law, of the trust deed, or that the complainants, or either of them had any interest in, or claim to the slaves; averring that he purchased them from Steinlein in good faith for a valuable consideration without notice of the claim or interest of any person in conflict with the absolute ownership of them by Nathaniel W. Dandridge, Jr. This appears to be full and explicit, and is sufficient to admit the defence.

This view of the case disposes of it, and renders it unnecessary to consider the defence of the statute of limitations.

The decree must be reversed and the bill dismissed. HANDY.

823. W. J. Fears, Adm'r vs. George A. Sykes.

This action was brought by the plaintiff in error to recover from the defendant a female slave in his possession, alleged to be the property of the plaintiff's intestate.

It appears by the record that the slave in controversy, had been the property of one John Chism, in the State of Alabama, prior to and during the year 1839, and on the 16th of September of that year, the Chism executed a bill of sale for her to the plaintiff's intestate, Hansford J. Fears—that on the 12th October of the same year, Chism executed a bill of sale for the slave, for a valuable consideration, to one Lewis G. Garrett, who, during that year, had her in open and public possession in the State of Alabama, and continued in possession there until August, 1855, when he sold her to the defendant for a valuable consideration, who brought her to this State, and has continued in possession.—There is some evidence tending to show that when Chism sold the slave to Garrett, he took her from Fears' possession without authority and delivered her to Garrett, and that Fears was desirous of regaining possession of her, but was unable to find where she was—yet it is fully proved that Garrett had her in open and notorious possession in a hotel kept by him in the town of Tuscumbia, in Alabama, for the greater part of the time when he owned her, claiming title to her. It is further shown that the plaintiff's intestate removed to this State in the year 1842 and 1843.

The decision of the case, under this state of facts, depends upon the question whether Garrett acquired a good title in virtue of his adverse possession in the State of Alabama, which is available to the defendant.

It is true that the statute of limitations of another State is not technically pleadable as a defence to a demand sued for in the courts of this State, because the defence of such statute strictly pertains to the *lex fori*—though to this rule there may be exceptions. Yet when title to personal property has been acquired under the laws of another State, by reason of possession held by a party for such length of time as under those statutes renders his title unimpeachable, such title may be shown in this State, and will be available to the party having such possession for the requisite time, and those claiming under him. In such case it is not the statute of limitations of another State that is relied on or pleaded, but the title acquired by operation of such statute, and where a title becomes perfect under the laws of one State it is valid in any other State. [Shelby vs. Gay, 11 Wheat 362; Moseley vs. Williams, 3 How. 520-523.

It appears to be the settled law of Alabama, that the statute of limitations of that State which bars the remedy for the recovery of personal property, also acts upon the title and destroys the right of the party setting up claim against the person in possession. [Sims vs. Canfield, 2 Ala. 555; Lays, Exe'r vs. Lawson, 23 Ala. 377.

Hence it is clear that the title of Garrett could not be questioned by the plaintiff after a possession in Alabama for about fourteen years. Nor is the question affected by the fact that Fears removed to this State before the bar had become complete by the possession of Garrett for the time prescribed by the statute, Garrett continued to reside there and had the slave in possession, and could have been sued there at any time, notwithstanding the removal of Fears; and it is this which bars the remedy and vests the right in the possession, whether the person setting up title against the possession resided there or not. The non-residence of the claimant does not appear to be enumerated as one of the exceptions in the statute, and there can be no reason why it should be allowed, especially when he was a resident of the State where the adverse possession commenced, and so continued for several years.

But it is insisted that it was a sufficient answer to the title of Garrett arising from the statute of limitations; that Chism took the slave from the possession of the plaintiff's intestate fraudulently, and carried her away secretly, so that she could not be found.

However these considerations might have operated in an action by the plaintiff against Chism if the slave had been in his possession, they can have no effect upon the title of Garrett, or of the defendant, derived from him. For aught that is alleged, Garrett had no connection with the fraudulent taking, or the concealment of the slave; but he appears to have purchased her fairly and for full value, and to have had her in his possession, in a very public manner. The remedy of the plaintiff's intestate against him was open and in no wise obstructed during all the period of his possession. His title, therefore, could not be affected by the fraud of Chism, and it became unimpeachable after his possession had continued for the period of six years prescribed by the statute of Alabama. That title was conveyed to the defendant, and constituted an ample defence to this action.

Let the judgment be affirmed. HANDY.

8[illegible]. Samuel Dixon, Ex'r, &c. vs. Locke E. Houston.

This case in its inception, was a petition for arbitration filed in the Court of Probates of Pontotoc. The material facts are as follows, to-wit: The last will and testament of William D. Dixon, deceased, was admitted to probate in said court on the 14th of January, 1856; and on the same day Samuel Dixon, who was appointed executor by the will, qualified as such, and took out letters testamentary. By the will, a legacy of five hundred dollars was given to Caroline Dixon, testator's sister of the half-blood; and the residue of the estate was bequeathed to Willis H. Dixon, upon condition that he survived the testator. Willis H. died, never having been married, before the testator, leaving neither wife, child, or lineal descendant, but having two brothers and a sister, to-wit: Tilman and Joseph Dixon, and Mrs. Greenbury, who were entitled as distributees to the undivided portion of his estate. The estate consisted of two slaves, some articles of personal property of trifling value, and of money due upon notes and accounts. The slaves were sold by the executor under order of court, on the 18th of April, 1856, upon twelve months credit, and on the 8th of June, 1857, the appellee filed his petition praying for a rule upon the executor to show cause why he should not make distribution of the estate; and tendered a refunding bond as required by statute in such cases. The petition claimed one third of the amount to be distributed after payment of the legacy of Caroline Dixon, and the necessary costs on a charge of the administration. The claim to distribution set up in the petition, was based on an alleged purchase by the petitioner of the distributive share or interest of Tilman Dixon, which was one-third of the residue after payment of the said legacy, and the costs and charges of administration. A rule was accordingly granted, and, at the hearing, a decree was rendered ordering the executor to pay the petitioner one thousand dollars; from which this appeal is presented.

Several objections are taken to the decree, but it will be necessary to notice only the exception which applies to the jurisdiction of the court.

The appellee was in no wise connected with the administration of the testator's estate. He occupied neither relation of heir of the deceased, distributee of the estate, nor that of legatee under the will. He was not in any sense of the term a creditor of the estate. Hence the jurisdiction of the court could not attach to him as a party interested in the succession. He claimed as purchaser and assignee of one of the distributees. The question of the validity and construction of the assignment was, therefore, directly and primarily presented for decision. It is evident that if the Court of Probates had jurisdiction to adjudicate the question in the manner it is presented, and to grant the relief prayed for, there are very few questions arising upon contracts, in which the legatees, distributees, and even creditors of decedents estate, which would not be brought within the jurisdiction of the Courts of Probate. The recognition of the doctrine would produce the most disastrous confusion, by entirely confounding the jurisdiction of these courts with the jurisdiction of the courts of law and equity in this State.

This view of the subject was held by this court in Hill vs. Hardy & Williams—[33 Miss. R.]—in which the prior question here considered was presented. The decision in that case is therefore a conclusive authority in the case before us.

Decree reversed and the petition ordered to be dismissed in the court below. SMITH.

829. S. G. Champion vs. The Memphis & Charleston Railroad Company.

This suit was brought in the Circuit Court of Tishomingo county to recover the amount of certain calls upon stock in the Memphis and Charleston Railroad Company, alleged to have been subscribed for by the plaintiff in error.

The answer of the defendant in the court below alleged in substance, that the act of the Legislature incorporating said Company within the State of Mississippi, and by which it acquired the right of way through the State, was upon the express condition that the Company should begin their road at some point on the northern boundary of the State of Mississippi, and run thence through the town of Holly Springs, in Marshall county, and thence in an easterly direction through said State to the eastern boundary thereof; that in pursuance of said act of incorporation, a legally authorized agent for the Company opened books for the subscription of stock, and represented to defendant that he was endeavoring to ascertain how much of the stock of the company he could get subscribed upon the conditions prescribed in the charter, and that he only desired subscriptions for the stock upon the condition that the road should run centrally through the counties of Marshall, Tippah and Tishomingo, and if the road should not be constructed upon that route and in strict accordance with the requisitions of the act incorporating said company, the subscriptions for stock, were to be void; that those representations and assurances were false and fraudulent, and made with the intent to deceive; but relying upon their truth and believing them to be made in good faith, the defendant was thereby induced to subscribe for the stock as alleged by plaintiff; "and that said road was not constructed in accordance with the requirements of the said charter."

The answer was held insufficient on demurrer, and judgment was entered for the plaintiff.

In enterprises of this character, a party who subscribes for stock is presumed to do so with reference to the route upon which the road is to be located, if the route has been prescribed by the charter. In the construction of a railroad, the selection of the route which it is to pursue must always be a material consideration. A contemplated railroad between Memphis and Charleston, to be located without the borders of this State, would be less valuable and therefore less desirable to the inhabitants of Marshall, Tippah, and Tishomingo, than a road between the same points which should pass through those counties. The situation of a particular route may, and doubtless often is, the very circumstance which has determined individuals to aid by contributions of money in the construction of the road. Where, therefore, the act of incorporation has prescribed the route on which the road is to be located, the location thus fixed may justly be considered as entering into, and forming of, a material part of the consideration to the subscriptions to the stock. Hence upon a plain principle of law, as well as justice, an abandonment of the prescribed route by the company, and the adoption of an entirely different one, would release the stockholders who had previously subscribed, and who had not consented to the alteration, from liability on their subscriptions. And this doctrine was held and settled by this court in the case of Hester against the present defendant in error—[32 Miss. R. 378.

But in these cases it is not every deviation from the prescribed route which will absolve the non-consenting stockholder from the obligation of his contract of subscription, and which, in extreme cases, no doubt could be entertained upon the question, either the subscriber was not released. The impracticability is admitted of laying down any general rule which will serve as a sure guide in all cases where the defence rests upon an alleged deviation from the route fixed by the charter. It seems that the nearest approach to a general rule on the subject, if it can properly be called a general rule, is to hold that the question in each case is to be determined by the circumstances of that particular case.

It is obvious, therefore, that the rule of pleading, which requires that the matters relied on for defence should be noted with clearness, precision, and accuracy, applies with great strictness in cases of this nature. The particular change in the location or deviation from the route prescribed in the charter, should be clearly and distinctly set out, so that the court, and the jury under the instruction of the court, might judge of its materiality. In this case the averment is "that the said road was not constructed in accordance with the requirements of said charter." Without any allegation showing in what particular, in the construction of the road, the charter was not complied with; whether there was even an immaterial change in or deviation from the route on which, under the directions of the charter, the road was to be located, or whether, in any other respect, there was such a non-compliance with its requisition as would in law operate a release from his subscription. It seems, therefore, not to admit of doubt that the answer was insufficient.

We have been referred by counsel to the case of Hester vs. Memphis and Charleston R. R. Co., above cited, as an authority sustaining the validity of the answer in this case. But upon —— it will be perceived that the proceedings in that and the present case are materially different. In Hester vs. The Company, the defence relied on was that the Company had not only deviated from the prescribed route, but had utterly abandoned it, and had located the road upon an entirely different one, and without the defendant's consent. And these facts were distinctly alleged.

Judgment affirmed. SMITH.

No. 838. Harriet Abbey vs. Thomas C. Billups, et al.

This suit was brought in the Circuit Court of Lowndes, by Harriet Abbey, against Thomas C. Billups et al., who are described as the Board of Trustees of the Collegiate High School of the Independent Order of Odd Fellows, in the city of Columbus, and alleged to be a corporation by the laws of this State. The complaint alleged that, as such Board of Trustees, the defendants on or about the first of October, 1855, in the county of Lowndes, rented from the plaintiff, the house, lot and premises, of which the plaintiff was then and there the owner; which said lot and premises were situated in the town of Columbus, for the sole purpose of conducting and carrying on the said Collegiate High School upon the express contract that, the defendants as such Trustees and Corporation, in consideration that the plaintiff would have, and rent to them, her said house, lot and premises, for the period of two months, commencing on the 1st of October, 1855, for the purpose of conducting and carrying on the said Collegiate High School, the defendants agree to pay plaintiff the sum of twenty-five dollars per month, and at the expiration of the lease, return the said house, lot and premises in as good condition and repair as they were when the defendants should receive possession of the same. That the defendants received and entered into the possession, use and occupation of the house, &c., at the time stipulated.—That the said house, &c., were in good repair when defendants received possession of the same, and that defendant's used and engaged them in that condition, for the purpose of conducting said Collegiate High School until within a short time of the expiration of the said lease, when the said house was consumed by fire. And further, that defendants have not delivered the said house, lot, &c., in as good condition and repair, as they were in when possession was delivered to them; but have refused to rebuild the said house, or otherwise to perform the stipulations of said contract.

A second count sets out substantially, but with some variation in the statement, the same cause of action, and the damages are laid at four thousand dollars. A demurrer to the complaint was interposed, which raises the question of the authority of the defendants as trustees of the Collegiate High School, to contract in the mode and upon the terms alleged. The demurrer was sustained, and the plaintiff declining to amend, judgment final was entered for the defendants. The cause hence comes into Court. In considering the propriety of the judgment, it is of course necessary to examine the act of incorporation under which, as it is alleged, the defendants proceeded in making the contract declared on. It appears from the preamble to the act of incorporation, that Covenant Lodge No. [illegible], and McKendree Lodge No. [illegible], of the Independent Order of Odd Fellows, in Columbus, had united for the purpose of establishing a seminary of learning in that city, and being desirous of placing it under the control of a permanent Board of Visitors, applied to the Legislature for an act to incorporate the persons named in the first section of the act, and their successors in office, who should, as the joint and permanent agents of the two Lodges, take the government of the school with corporate powers sufficient to carry into effect their objects. Accordingly, by the first section of the act, those persons and their successors in office, were incorporated as a Board of Trustees for the Collegiate High School in the city of Columbus. By the second section of the act of incorporation, the said Board of Trustees, and their successors in office were empowered to acquire property, either by gift, purchase or otherwise, not exceeding in value at any one time the sum of fifty thousand dollars, to hold and convey the same in their corporate name, to sue and be sued, &c., and to enjoy all legal privileges commonly appertaining to such incorporations, not contrary to the constitution and laws of the State. In general, a corporation is restricted to the mode of contracting prescribed by the charter.—But when no particular mode is prescribed by the act of incorporation, it is well settled in this country, that the acts of a corporation evidenced by vote written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporate seal; that it may as well be bound by express promises, through its authorized agents, as by deed, and that promises may as well be implied from its acts, and the acts of its agents, as if it had been an individual. [Cases cited at p. 474, Ang. & Ames on Corp.] Here the charter contains no direction in regard to the mode in which the Board of Trustees shall contract, hence there is no doubt, that the alleged contract, the execution of which is admitted by the demurrer, is obligatory upon the defendants in error, if the Board of Trustees had authority under the charter to enter into it. We will therefore proceed to consider this question.

In this country, there is no diversity of opinion as to the rules to be applied in determining the powers and capacities of a corporation. A corporation is an artificial being, created by law for specified purposes. It stands, therefore, on a very different footing from a natural person. There is this distinction, it is said, between an individual and a corporation: "An individual may perform all acts and make all contracts which are not in the eye of the law inconsistent with the welfare of society; a corporation possesses only the powers and capacities which are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted: and hence it can make only such contracts as are connected with the purpose for which it was created, and which are necessary either directly or incidentally, to answer that end." [2 Kent Com. 298; 7 How. Miss. R. 530.] The application of these principles in determining the extent of the powers conferred by the act of incorporation upon the Board of Trustees, leaves not the slightest doubt that they were vested with authority to acquire lease-hold property in lands and houses, which was useful or necessary for the purposes of the school.

A lease for years is a bargain and sale of the demised premises for the term. And here the rent agreed on was in effect the price or purchase money to be paid for the ownership of the premises during the continuance of the lease. An estate in lands for years or for life, is as much property as an estate in fee simple. The proposition is therefore too clear for debate, that the power vested in the Board of Trustees to acquire property by gift, purchase or otherwise, as fully authorized them to acquire an interest in lands and houses for the term, or for life, as to become the owner of the same in fee. Indeed, we do not understand counsel as seriously contesting the authority of the Board of Trustees to make a lease of lands and houses, but to deny their power under the charter, to enter into any covenant which would render the corporation responsible for injuries to the demised premises, resulting from fire or other unforeseen and unavoidable accident. In other words, that the corporation was incapable of becoming an insurer against fire. The question whether a lessee who contracts to keep the demised premises in repair, and at the determination of the lease, to surrender them in as good condition as they were in at the date of the lease, in the event of the destruction of the buildings by fire during the term, without his default, would be bound to rebuild them, has never been decided in this Court. Under these circumstances, that the tenant would be bound to rebuild, is the ancient and well settled doctrine of the English Courts.—The case of Walton vs. Waterhouse, 2 Saun. Rep. 422, and the cases cited in note (2) to that case, contain all the English law on the subject; the principle extracted from which is "that although a man may be excused from a duty imposed upon him by the law, if he is disabled from performing it without any fault of his own; yet when by his own contract he creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. The same doctrine is generally recognized in this country. [Story on Con. 561; 3 Harris & John. 504; 1 Parsons on Con. 425; 7 Porter 42, Phillips vs. Stevens 16, Mass. R. 238.] And we are satisfied that the doctrine is a correct one. Such being the proper construction and legal effect of a covenant by the lessee, to keep the demised premises in repair, and at the determination of the lease to surrender them in as good condition as they were in when the lease was made, we will proceed to ascertain whether the act of incorporation vested in the Board of Trustees the power and capacity to enter into a covenant of that character. If the question were simply whether the Board of Trustees in virtue of the powers conferred by the charter, have or have not the authority to enter into policies of insurance against loss by fire, or by other casualties, where the consideration of the contract and the object of the insurance is a stipulated premium, no doubt could exist on the subject. The business of insurance is entirely foreign to the objects of the incorporation. Manifestly, the authority to make such contracts is not expressly granted, and it cannot be conceived how its exercise is necessary to carry into effect the express powers. But there is an essential and manifest distinction between a policy of insurance in the legal sense of the term, and the contract declared on. In the latter the sole object of the Trustees was the acquisition of property needful in effectuating the purposes for which the charter was granted. There was no stipulated premium, and a profit in that shape, manifestly, was not in the contemplation of the parties. It must be supposed that the Trustees understood the legal operation of the contract, and hence their liability to repair injuries to the leased premises occasioned by inevitable accident, as well as those which would result from the decay of the buildings or other natural causes, constituted part of the consideration for their ownership of the property during the continuance of the lease. It is not to be controverted, that the Trustees were capable of binding the corporation to make good any deterioration in the premises which would result from natural or unknown causes. And, therefore, it is not easy to perceive why they were not capable of obliging the corporation to make good injuries occasioned by accidental causes. Indeed, it seems impossible in contracts of this character to draw a distinction between the power requisite to make a valid contract to repair anticipated or inevitable injuries, and a contract to make good injuries resulting from accident. In the very nature of things there can be no distinction between the power requisite to make a valid contract in the one or the other. It is only by looking at the subject matter of the contract, and not at the capacity to contract, that any misapprehension could arise. It follows from this view of the subject, that the Board of Trustees of the Collegiate High School in making the alleged contract, acted within the limits of their chartered powers. Hence, that the demurrer to the complaint was improperly sustained. We therefore reverse the judgment and remand the cause, with leave to the defendant in error to answer the complaint in Court below. SMITH.

No. 836. John Crusoe, vs. Thomas J. Butler and wife.

This was an action of ejectment, brought by the defendant in error, to recover a tract of land in Lowndes county, in the possession of the plaintiff in error, who held under one Abijah Mann, Jr.

The claim of the plaintiff below was founded upon the title of Mrs. Butler, as sole heir at law of Joshua B. Leavens, deceased.

By agreement of the parties, it was admitted on the trial, that Joshua B. Leavens was a resident citizen of the State of Alabama, and that he died there, having at the time of his death a perfect title to the land in controversy—that a copy of a deed of conveyance for the land executed by Benjamin Leavens, executor of Joshua B. Leavens, to Abijah Mann, Jr., dated 17th April, 1841, should be admitted in evidence, to have the same effect as the original would have, if produced and proved—that at that date, Helen A. Butler, one of the plaintiffs, was under the age of twenty one years, but was married to Thomas J. Butler, and was the only child and heir at law of Joshua B. Leavens, and that her mother was dead; and accompanying this agreement, was the deed referred to in it. Upon this evidence, and upon the admission that the defendant was in possession of the premises, the evidence in behalf of the plaintiff closed.

The defendant then read in evidence the deed above mentioned, from Benjamin Leavens, executor of Joshua B. Leavens, to Abijah Mann, Jr., for a large quantity of lands, embracing that in controversy, reciting the consideration of it to be a full settlement of all the causes of difference between the surviving partners of the firm of St. John and Leavens, and Benjamin Leavens, executor, he acting in the matter under the powers conferred upon him by the will of Joshua B. Leavens, and representing the interests of his estate.

The defendant then offered in evidence a copy of the bond executed by Benjamin Leavens, as executor of Joshua B. Leavens, dated the 8th July, 1835, from the Probate Court of Mobile county, in the State of Alabama, duly authenticated, and a copy of the petition filed in that Court by Butler and wife, in February, 1838, setting forth the grant of letters testamentary upon the estate of Benjamin Leavens, on the 8th July, 1835, the Probate of the will in that court, and praying distribution of the estate to them.

He next offered in evidence, an exemplification from the Probate Court of Lowndes county, in this State, of the record of an authenticated copy of the last will and testament and codicil, of Joshua B. Leavens, deceased, as admitted to probate in the Probate Court of Mobile county, in the State of Alabama. This exemplification and the authenticated copy from the Probate Court in Alabama, incorporated into it, contains the will of Joshua B. Leavens and codicil to it, each appearing on the face to have been attested and subscribed by three witnesses, showing that on the 8th July, 1835, the will and codicil were produced by Benjamin Leavens, in the Orphan's Court of Mobile county, and that he proved "the due execution of said will by the oath of John Elliott, one of the subscribing witnesses thereto, and of said codicil by the oath of Newton St. John, one of the subscribing witnesses to the same," and that it was thereupon ordered that the will and codicil should be admitted to Probate, and that letters testamentary be granted to Benjamin Leavens. And the exemplification shows that this authenticated copy was at the August term, 1854, of the Probate Court of Lowndes county, "ordered to be admitted to Probate, and recorded in that Court, as an authenticated copy of the last will and testament of Joshua B. Leavens, deceased."

He next offered in evidence an authenticated transcript of the same will and probate from the Probate Court of Mobile county.

He then offered in evidence a transcript of the record from the Circuit Court of the United States in Alabama, showing a bill in Chancery filed by the surviving partners of St. John and Leavens, against Benjamin Leavens, executor, and Butler and wife as heirs and distributees of the estate of Joshua B. Leavens, in a very large amount of moneys of the firm, applied by Joshua B. Leavens to his individual benefit in speculations and otherwise, and in purchasing large quantities of land in this State and elsewhere, and seeking to charge those lands with the debt due to the surviving partners, or to have an interest in their behalf declared upon those lands.—The record shows the answer of the executor, and of Butler and wife to the bill; and that after the cause was at issue upon the pleadings and in progress of litigation, that the bill was dismissed on the motion of the complainants.

The defendant then offered in evidence the deposition of George E. Sheffield, who testified that though one of the executors appointed by the will of Joshua B. Leavens, he did not qualify, and therefore, did not join in the conveyance of the land made by Benjamin Leavens to Abijah Mann, Jr., that this conveyance was made by way of compromise and settlement of a large indebtedness from Joshua B. Leavens to the surviving partners—that he considered the settlement advantageous to the estate, and so advised the executor.

Also, the deposition of William Dunn, who testified that he was solicitor for the complainants in the suit in Chancery, that the suit was settled by compromise, and the lands described in the deed above mentioned, were conveyed as a part of the compromise, and that the suit was dismissed in consequence of that settlement.

Also, the deposition of Samuel St. John, one of the partners of the firm, who testified in substance, as the witness Dunn, in relation to the settlement and dismissal of the suit in consequence of it, and that the debt against the estate thus settled was large, and not paid by the settlement by a large amount.

Also, the deposition of John A. Campbell, who testified that he was solicitor for Benjamin Leavens in the suit in Chancery, and that it was settled about the time the deed bears date; that the negotiations which led to the settlement were carried on, whilst the parties were engaged in taking depositions in the suit, and were conducted under the professional advice of the law firm of which witness was a member, representing Benjamin Leavens, executor, and of George N. Stewart, who represented Butler and wife—that Leavens instructed witness to consent to no agreement for settlement unless it was assented to by Butler—and he thinks that the most important, if not all the papers of the settlement were drawn by Mr. Stewart, counsel for Butler and wife; that Butler assented to the settlement, and gave Leavens a writing to that effect. But witness had no conversation with Mrs. Butler on the subject, and could not recollect any personal interference by her in the matter; that he considered the settlement fair, and favorable to the estate of Leavens—the debt claimed against it at the date of settlement being over one hundred thousand dollars.

The defendants also offered two other transcripts of records in Chancery in the State of Alabama, showing that Butler and wife had admitted by their bill in the one case, and by their answer in the other, the due execution and probate of the will of John B. Leavens in that State.

To the reading of each of these several transcripts and depositions, the plaintiffs objected, and their objection was sustained, and all the transcripts and depositions were excluded as evidence, to which the defendant excepted.

Upon the competency and effect of the evidence thus rejected, several questions arise, and have been argued by counsel; and we will proceed to consider such of them as appear to be material in settling the principles which govern this case.

We will first consider the action of the Court in rejecting the record of the probate of the will in Alabama.

The rule is well established that the conveyance of real estate must be made according to the law *rei sita*, which alone can prescribe the mode in which title to such property or any right or interest therein may pass; and a will made and admitted to probate in a foreign State, or in one of the States of this confederacy, is not sufficient to pass title to land in another State where it is situate, unless the will be admitted to probate in the latter jurisdiction according to its laws. [McCormick vs. Sullivant, 10 Wheat 202; United States vs. Crosby, 7 Cranch 115; Kerr vs. Moore, 9 Wheat 365; Carmichal vs. Elmindorf, 4 Bibb 484; Cornelison vs. Browning, 10 B. Munroe, 428.] This rule is not affected by the provisions of the act of Congress of 26 May, 1790, "that the records and judicial proceedings of the Courts of any State, shall be proved or admitted in any other Court within the United States, &c., * * * and that said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the Courts of the States from whence said records are or shall be taken." Under this act, the record of a judgment in one of the States is entitled only to such credit, validity and effect in another State, as it has in the State where it was rendered.—But as a will disposing of real estate is only effectual for that purpose when made according to the law of the State where the land is situate, and its operation is entirely local, a probate in another State could give it no credit or validity there as to such land, and consequently, under the provisions of the act of Congress, it could give it none in the State where the land lay.—Accordingly, cases are numerous where probates of this character have been held insufficient to establish the will in another State where the land was situate, so as to pass the title. [Barnes vs. Brashear, 2 B. Munroe 380; Varner vs. Bird, 17 Ala. 290.] Considering how well recognized the rule has always been that the title to lands can only be conveyed according to the law of the State where they are situate, it is not to be supposed that it was the intention of the act of Congress to give to another State, presumed to be unacquainted with the laws of the State where the lands are situate, the power to establish a conveyance, and by the judgment of its Courts render it effectual to pass the title; for that would give to a foreign tribunal power to establish a conveyance, and adjudge the title to land in another State, contrary to the positive laws of that State. It is much more reasonable to suppose that the act was intended to apply to judicial proceedings affecting rights of a personal or transitory character, and this we consider the proper construction of it. Hence, the record of the probate from Alabama, was not sufficient to establish the will, and it was properly excluded as evidence.

The next question, arises upon the exclusion of the record of the probate in the Probate Court of Lowndes county.

There can be no doubt but that a copy of a will bearing upon its face the requisites of our laws in order to render it valid as to real estate, and shown to have been duly proved and admitted to record in another State in which the testator had his domicil, may be admitted to probate in this State, and may be effectual as to lands lying here. Such is the plain effect of our statute upon the subject. Hutch. Code 651, 625; and the like effect has been given to such probates under similar statutes in other States. This is held in the cases above cited from Kentucky and Alabama, and 10 Wheaton.

But two objections are urged against the sufficiency of this probate. The first is, that the will appears upon the face of the authenticated copy from Alabama, to have been proved in that State by but one of the subscribing witnesses, thus appearing on the face of the will to be three. The record shows, that the execution "proved the due execution of the will by the oath of John Elliott, one of the subscribing witnesses thereto, and of said codicil by the oath of Newton St. John, one of the subscribing witnesses to the same," and that it was thereupon admitted to probate, &c. This showed sufficient proof of the will. When there appears by the face of the will to have been the requisite number of subscribing witnesses, the will may be proved by one if he prove that it was duly attested by the others. And if the record state that it was duly proved by one of them and admitted to probate, and it does not affirmatively appear that witness proved only the attestation by himself and the execution in his presence, it will be presumed that he testified to every fact necessary to due execution. [Cornelison vs. Browning, 10 B. Munroe, 425, 427, and the cases there cited.

This objection, however, is untenable for another reason. The copy of the will was "ordered to be admitted to probate and recorded" in the Probate Court of Lowndes county. That act was clearly within the jurisdiction of the Court, and it cannot be collaterally impeached, even if the Court acted erroneously in its judgment as to the sufficiency of the original probate in Alabama. [Griffith's adm'r. vs. Vertner 5, How. 736.] It stands like any other judgment of a Court of competent jurisdiction, and can only be declared invalid by a direct proceeding for that purpose.

The other objection is, that the admission of the will to probate in this State was not made until the year 1854, and after the date of the deed from the executor under which the defendant claimed title and after the commencement of this suit.

The codicil of the will under which the power to make the deed is claimed is in these words: "I do hereby declare and direct, and give full power and authority to my said executors," (previously named,) "or the survivor of them, and shall have full power whenever, and from time to time, as they may think expedient, and according to their discretion, to bargain, sell, convey, lease, release, or encumber, or otherwise dispose of in fee, or otherwise, all and any of my real estate, wheresoever the same may be situate, either for the purposes of paying debts, making divisions or distribution, or when they shall think it beneficial for any purpose to do so, in which case, the proceeds shall be distributed, kept or applied, as the property is required to be by my said will, the true intent and meaning of this codicil being fully to affirm the dispositions of my said will, and the better to enable my executors to carry into effect, and the better to enable them to place the said property in such situation as may be convenient and more beneficial and profitable, and by giving the power to sell and convey lands to enable them more conveniently to benefit all parties interested in the bequests thereof. By the will, he had previously given one fourth of his estate real and personal, to his brother, Benjamin Leavens, to his sister Susan, one fourth part, and the residue, to his daughter, Mrs. Butler.

It cannot be doubted that a special *power to sell the lands* was conferred upon the executors by the codicil, and that they were capable of exercising it so soon as the will was admitted to probate. It was derived from the will and the probate was but evidence of its execution, and not the foundation of the power granted to the executors, and this is especially true, for the power conferred was foreign and distinct from the ordinary office of the executors. When the will was probated in Alabama, the power granted had relation back to the death of the testator.—The grant of letters was merely the establishment of the character of the executors, and operated as a sanction to their exercise of the special power granted to them in their character as executors by the will. The power in them was thus complete upon the probate of the will, and their undertaking the trust in Alabama; and when the will was admitted to record in this State it was merely for the purpose of authenticating the evidence by which the special power was established, and of rendering the prior right available here. But it was clearly neither the source nor the foundation of the power. Being the grant of a power not appertaining to the duties of an executor in the general administration of the estate, it comes within the rule laid down in the authorities in relation to the general powers of executors in England. "Such probate," says Williams, "is, however, merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death." Hence the probate when produced is said to have relation to the time of the testator's death. [Wms. ex'rs 172, 2d Amer. edit.] And it is laid down that though an executor may dispose of the property according to the will before probate, yet if it be necessary to support the title so derived, the probate must be produced—[ib. 174.]—